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WIRELESS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANGELA GASPAR and DARRIN WILLARD, on behalf of Themselves and all others similarly situated,

Plaintiffs,

v.

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, VERIZON COMMUNICATIONS, INC., VODAPHONE GROUP PLC and DOES 1-100,

Defendants.

Case No. CV10-02139-DSF(SSx)

NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: August 9, 2010
Time: 1:30 p.m.
Judge: Hon. Dale S. Fischer
Courtroom: Roybal 840

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on August 9, 2010 at 1:30 p.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Dale S. Fischer, United States District Judge, Central District of California, located at 255 East Temple Street, Los Angeles, California 90012, Defendant Cellco Partnership dba Verizon Wireless will move, and hereby does move to dismiss Plaintiffs'

Complaint pursuant to Fed. R. Civ. P. Rule 12(b)(6) on the grounds that it fails to state a claim upon which relief can be granted.[1]

This Motion is based on this Notice of Motion and Motion, Defendant's supporting Memorandum of Points and Authorities, Defendant's Request for Judicial Notice and the Declaration of Ana Diaz and exhibits attached thereto, and the court records and files in this Action.

This motion is made following a conference of counsel pursuant to Local Rule 7-3 which took place on May 17, 2010.

Dated: June 4, 2010

DAN MARMALEFSKY
SAMANTHA P. GOODMAN
MORRISON & FOERSTER LLP

By: /s/ Dan Marmalefsky
Dan Marmalefsky

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CELLCO PARTNERSHIP dba
VERIZON WIRELESS

[1] Verizon Wireless files this Motion to Dismiss concurrently with the filing of its Motion to Compel Arbitration and Stay Proceedings. Verizon Wireless contends that the Motion to Compel Arbitration and Stay Proceedings should be considered and ruled upon by the Court first and that this Motion to Dismiss should only be considered by the Court in the event the Motion to Compel Arbitration and Stay Proceedings is denied. Verizon Wireless' precautionary filing of this Motion to Dismiss should not be construed as a waiver of the right to compel arbitration. Verizon Wireless has calendared this motion for hearing one month after the hearing date on the Motion to Compel Arbitration, so that the Court and Plaintiffs' counsel need not devote attention to this motion in the event the latter motion is granted and this motion becomes moot.

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I. INTRODUCTION

Plaintiffs Angela Gaspar and Darrin Willard's complaint stems from their apparent dissatisfaction with one of the terms of the contract they each signed with Verizon Wireless — specifically, that their wireless phone service is sold to them in monthly increments and that if they cancel their phone service before the end of a monthly billing cycle, they are responsible for paying for that full month of service. Plaintiffs do not contend that they were unaware of this term when they signed their contracts nor do they claim that Verizon Wireless in any way misrepresented the terms of the contract. Instead, they allege that this policy of "non-proration" per se violates California's Consumer Legal Remedies Act and Unfair Competition Law. This contention fails as a matter of law.

First, Plaintiffs' state law claims are barred by the Federal Communications Act ("FCA"), which places exclusive jurisdiction over the rates and rate structures for wireless communication services with the Federal Communications Commission ("FCC"). The decision as to the increments of time for which service will be offered and whether to allow customers to change these increments by unilaterally cancelling service in the middle of such an increment is a fundamental part of the rate structure for wireless service. Numerous courts have held that the FCA preempts state law actions, such as this one, that challenge wireless carriers' decisions on how and in what increments to price their services. To the extent Plaintiffs have a complaint about Verizon Wireless's rate structure, the proper forum for this issue would be the FCC, not California law.

Second, even if Plaintiffs' claims were not preempted, they still necessarily fail as a matter of law because the terms of the contracts they specifically agreed to are in no way unconscionable, unlawful, or unfair. As with any periodic service contract, the service must be sold in some unit of time, and there is absolutely no authority to suggest that selling a service in monthly increments is so egregious as

to be labeled unconscionable. While Plaintiffs contend that Verizon Wireless could program its billing systems to allow Plaintiffs to receive a refund if they cancel their service in the middle of a monthly increment, that is beside the point; there is simply no legal authority to suggest that — even if this was true — a clearly disclosed and freely agreed to contractual term that did not allow for such proration should be voided as a matter of law. Indeed, Plaintiffs could readily have avoided the harm about which they complain by simply cancelling the service agreement on the last day of the billing cycle instead of earlier. Thus, there is no basis for finding the terms of the contract unfair or unconscionable.

Finally, the claims of Plaintiff Angela Gaspar should be dismissed for lack of standing because she has not yet cancelled her wireless phone service with Verizon Wireless, the disputed "non-proration" policy has not been applied against her, and she therefore has not suffered any harm as a result of it.

Plaintiffs' claims against Verizon Wireless should be dismissed.

II. SUMMARY OF PLAINTIFFS' ALLEGATIONS

Plaintiffs allege that they each entered into a contract with Verizon Wireless for wireless voice and data communications services. (Complaint ("Compl.") ¶¶ 9, 22, 23.) Each contract provided for an initial two-year minimum term for the service agreement. (Request for Judicial Notice Exs. A, E.) The Customer Agreements that both Plaintiffs agreed to state:

> If you terminate your service as of the end of your minimum term, you won't be responsible for any remaining part of your monthly billing cycle. **Otherwise, all terminations by you during a monthly billing cycle become effective on the last day of that billing cycle.** You'll remain responsible for all fees and charges incurred until then and won't be entitled to any partial-month credits or refunds.

(Request for Judicial Notice Exs. B at p. 2, D at p. 8 and F at p. 2 (emphasis in originals).)

Plaintiff Darrin Willard cancelled his service agreement with Verizon Wireless on or about December 21, 2009. (Compl. ¶ 23.) Pursuant to the terms of the Customer Agreement, Willard was obligated to pay for the remainder of that monthly billing cycle; the charges were not prorated. (*Id.*; Request for Judicial Notice Exs. B at p. 2 and D at p. 8.)

Plaintiff Angela Gaspar entered into a service agreement with Verizon Wireless in January of 2010. (Compl. ¶ 22.) Gaspar has not terminated her service agreement. (*Id.*) Accordingly, the non-proration policy about which she complains has not been applied to her. (*Id.*)

Willard and Gaspar do not allege that they were tricked or coerced into entering into the service agreements with Verizon Wireless. In addition, neither alleges that Verizon Wireless breached any term of their service contracts. Instead, the Complaint is based solely on their after-the-fact dissatisfaction with terms of the contracts that they entered into with Verizon Wireless and with Verizon Wireless's compliance (or in the case of Gaspar, expected compliance) with those contract terms.

Based on these allegations, Plaintiffs assert three claims: (1) violation of the California Consumer Legal Remedies Act; (2) violation of California Business & Professions Code section 17200; and (3) unjust enrichment/common law restitution. (Compl.)

III. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM

Dismissal under Rule 12(b)(6) for failure to state a claim upon which relief can be granted may be based either on the lack of a "cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions,

and a formulaic recitation of a cause of action's elements will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). A complaint or any claim therein should be dismissed without leave to amend if the deficiencies of the complaint cannot be cured by amendment. *Doe v. United States (In re Doe)*, 58 F.3d 494, 497 (9th Cir. 1995). Here, Plaintiffs' Complaint is preempted by the FCA, fails to state a claim on any of the three alleged causes of action and additionally fails to state any claim on behalf of Plaintiff Angela Gaspar due to her lack of standing. Because these deficiencies cannot be cured by amendment, Plaintiffs' Complaint should be dismissed with prejudice.

A. Plaintiffs' Claims Are Preempted By The Federal Communications Act

Section 332 of the Federal Communications Act explicitly preempts any effort by the states to regulate the rates charged by wireless carriers. 47 U.S.C. § 332(c)(3)(A). It states: "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulation the other terms and conditions of commercial mobile services."[2] *Id.* The preemptive effect of Section 332 is not limited to traditional state utility regulation, but also covers claims brought under general consumer law. *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. 17021, 17037, 17041 (2000)("a court will overstep its authority under Section 332 if…it does enter into a regulatory type of

[2] The last clause of section 332, which excludes from preemption the regulation of "other terms and conditions of commercial mobile services" does not apply to Plaintiffs' claims in this case. Given the statute's express preemption of state regulation of rates and entry, the savings clause can only be read to preserve state authority over terms and conditions *other than* rates and entry. Moreover, the last clause of section 332 has generally be interpreted in the context of rates and rate structures to permit only state-law claims premised on inadequate disclosures of rates and rate structures – which is not alleged in this case. *See, e.g., Spielholz v. Super. Ct.*, 86 Cal. App. 4th 1366, 1375 (2001).

analysis that purports to determine the reasonableness of a prior rate or it sets a prospective charge for services.")

Pursuant to Section 332, any challenge to the reasonableness or legality of a wireless carrier's rate is expressly preempted by federal law. *See, e.g., Ball v. GTE Mobilnet of Cal.*, 81 Cal. App. 4th 529, 543 (2000)(state law claims preempted where the claims "challeng[e] the reasonableness or legality of [a] particular rate or rate practice"); *Cellco P'ship v. Hatch*, 431 F.3d 1077, 1082 (8th Cir. 2005)(finding Minnesota statute requiring that changes to a customer agreement take effect subject to a 60-day opt out period to be preempted); *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1073 (7th Cir. 2004)("state law claims are preempted where the court must determine whether the price charged for a service is unreasonable, or where the court must set a prospective price for a service."); *AT&T Corp. v. FCC*, 349 F.3d 692, 700-01 (D.C. Cir. 2003)(same); *In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. at 17035-36, 17041 (state law may not be applied in a way that interferes with wireless carrier's right to "charge whatever price it wishes," or "determine the reasonableness of a prior rate" or "sets a prospective charge for services"). The FCC has explained that Section 332 preemption applies to actions addressing both rate levels and rate structures. *In re Southwestern Bell*, 14 F.C.C.R. 19,898, 19,907 (1999) ("states not only may not prescribe how much may be charged for these services, but also may not prescribe the rate elements"); *see also In re Wireless Consumers Alliance, Inc.*, 15 F.C.C.R. at 17028 ("At the outset of our analysis on the preemptive scope of Section 332, we observe that Section 332(c)(3)(A) bars state regulation of, and thus lawsuits regulating…the rates or rate structures of CMRS providers.").

Plaintiffs' claims in this case are based on their allegation that the non-proration policy should not be enforced because it is unconscionable, unenforceable and illegal under California law. (Compl. ¶¶ 70, 74.) This lawsuit thus seeks a judicial determination that the practice of charging for wireless service in monthly

increments – and of not prorating the charges for the final month of service – is unreasonable based on the amount of services provided by Verizon Wireless to Plaintiffs during their final monthly billing cycles under state law. In order to adjudicate these claims, the court would necessarily have to engage in a reasonableness inquiry regarding Verizon Wireless's rates and billing rate structure, which is precisely the inquiry that is prohibited by Section 332 preemption. *See, e.g., Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 724 n.4 (9th Cir. 2007)("in order for [plaintiff] to maintain his UCL claim, while avoiding FCA preemption, his claim must be tied to the unfairness of AWS's disclosures regarding its billing practices, and not to the practices themselves.").

Indeed, courts have repeatedly found that claims challenging a wireless carrier's decision to charge for services in particular increments are preempted by the Federal Communications Act. For example, in *Ball. v. GTE Mobilnet of California*, the California Court of Appeal found that the FCA preempts claims challenging defendants' practice of rounding up to the next full minute of cellular phone use for billing purposes. *Ball*, 81 Cal. App. 4th at 537-40. The court explained that the claim that subscribers were being "overcharged for service" because they were required to pay for time they did not use constitutes "a direct challenge to the rates charged by the defendants for cellular phone service" and is therefore preempted. *Id.* Here, just as in *Ball*, Plaintiffs claim that they are being charged for a period of time (the balance of a monthly billing segment) they did not use; such a claim constitutes "a direct challenge to the rates charged by the defendants for cellular phone service" and is preempted.

Similarly, in *In re Comcast Cellular Telecom. Litigation*, the court found that a challenge to the practice of rounding-up, and thus charging for calls in one-minute increments, was preempted by the FCA because such claims "direct[ly] challenge the reasonableness of the rates charged"). *In re Comcast Cellular Telecom. Litigation*, 949 F. Supp. 1193, 1200 (E.D. Pa. 1996). The FCC has reached the

same result, finding that a policy of charging for calls in whole minute increments is exclusively governed by the FCA and any state law claims challenging such policy are preempted. *In re Southwestern Bell*, 14 F.C.C.R. at 19,908.

Therefore, because Plaintiffs' claims in this lawsuit directly challenge Verizon's billing rates and rate structure, they are preempted under Section 332(c)(3)(A) of the Federal Communications Act and must be dismissed.

B. Plaintiffs' First Cause Of Action Fails To State A Claim For Violation Of The CLRA

Even if Plaintiffs' claims were not preempted, they would fail to state a claim as a matter of law. Plaintiffs allege that Verizon Wireless violated California Civil Code Section 1770(a) subdivisions 14 and 19 by including the non-proration provision in its service agreements. In fact, inclusion of that provision in the contracts does not violate either of the two enumerated subdivisions of the CLRA.

1. The Non-Proration Provision Does Not Violate Civil Code Section 1770(a)(14)

Civil Code section 1770(a)(14) makes it a violation of the CLRA to "[r]epresent[] that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."

Plaintiffs do not allege that Verizon Wireless represented that its service agreements conferred or involved rights, remedies, or obligations which they did not have or involve. To the contrary, Plaintiffs filed this lawsuit because Verizon Wireless abides by the terms of the service agreements – including the non-proration provision – and not because it allegedly misrepresented any facts. Because Plaintiffs do not allege that Verizon Wireless misrepresented any of the terms in the service agreements, Plaintiffs fail to state a claim on this theory. *See, e.g., Davis v. Ford Motor Credit Co.*, 179 Cal. App. 4th 581, 599 (2009)(plaintiff failed to state a cause of action under subdivision (a)(14) because defendant did not misrepresent the terms of the retail installment sale contract); *Van Ness v. Blue Cross of Cal.*, 87 Cal. App. 4th 364, 377 (2001)(judgment for defendant on

subdivision (a)(14) claim affirmed where the clear language of the insurance policy did not represent that the transaction confers or involves rights, remedies, or obligations which it does not have or involve); *Augustine v. FIA Card Serv., N.A.*, 485 F. Supp. 2d 1172, 1174 (E.D. Cal. 2007)(finding no misrepresentation under the CLRA where defendant's practice of retroactively increasing interest rates was disclosed in the contractual agreement).

Although not apparent from the Complaint, Plaintiffs presumably contend that Verizon Wireless violated subdivision (a)(14) of the CLRA because the transaction with Plaintiffs involved rights, remedies, or obligations that are "prohibited by law." However, Plaintiffs fail to identify any law that prohibits the non-proration provision that is the focus of Plaintiffs' lawsuit. Nor in fact does any provision of Federal or California law prohibit a wireless phone service provider from selling service in monthly increments or from enforcing a contract that requires customers to pay for a full month increment of service even if they choose to cancel that service before the end of the month. Absent any allegation that identifies a law that prohibits these agreed-upon contract terms, Plaintiffs' Complaint fails to state a claim under CLRA subdivision (a)(14).

2. The Non-Proration Provision Does Not Violate Civil Code Section 1770(a)(19)

Civil Code section 1770(a)(19) states that it is a violation of the CLRA to "[i]nsert[] an unconscionable provision in the contract." Plaintiffs allege that Verizon Wireless violated this subdivision by inserting the non-proration provision into their service agreements. (Compl. ¶ 70.) Plaintiffs cannot state a claim based on this alternate theory either, because the non-proration provision is not unconscionable as a matter of law.

Unconscionability is a question of law for the court. *Aron v. U-Haul Co. of Cal.*, 143 Cal. App. 4th 796, 808 (2006). Unconscionability has both a procedural and substantive element – both of which must be present in order for a court to

invalidate a contract clause. *Aron*, 143 Cal. App. 4th at 808. Plaintiffs' conclusory allegation that the non-proration provision is "unconscionable" – without any facts that demonstrate such unconscionability – is insufficient to state a claim. *Shadoan v. World Savings and Loan Ass'n*, 219 Cal. App. 3d 97, 103 (1990)("To allege that the contract was unconscionable states no more than a legal conclusion" which is insufficient to withstand demurrer). An examination of the sparse factual allegations in Plaintiffs' Complaint demonstrates that Plaintiffs do not – and indeed cannot – allege either, much less both, of the required elements of unconscionability necessary to sustain their claim. Nor is such a claim plausible as required by *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

a. Plaintiffs Have Not Alleged Procedural Unconscionability

The procedural element of unconscionability focuses on two factors: oppression and surprise. *Aron*, 143 Cal. App. 4th at 808. "Oppression arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." *Id.*, citing *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486 (1982). "Surprise" involves the extent to which the challenged term is hidden in a prolix printed form or is otherwise beyond the reasonable expectation of the weaker party. *Morris v. Redwood Empire Bancorp*, 128 Cal. App. 4th 1305, 1322-23 (2005); *Aron*, 143 Cal. App. 4th at 808.

Here, Plaintiffs have not alleged "oppression" because they do not allege that they lacked alternative sources from which to purchase wireless phone service other than Verizon Wireless. *Aron,* 143 Cal. App. 4th at 809 ("there can be no 'oppression' when the customer has meaningful choices," such as renting from another truck rental company); *Belton v. Comcast Cable Holdings*, 151 Cal. App. 4th 1224, 1245 (2007)("The availability of alternative sources from which to obtain the desired service defeats any claim of oppression, because the consumer has a meaningful choice."). Absent any alleged facts demonstrating that Plaintiffs could

not purchase wireless phone service from any other source, their Complaint fails to allege adequately the required element of procedural unconscionability. *Morris*, 128 Cal. App. 4th at 1320 (finding no oppression where plaintiff "failed to allege he could not have obtained merchant credit card services from another source on different terms" and where plaintiff was under no immediate pressure that precluded him from seeking alternative sources); *Shadoan*, 219 Cal. App. 3d at 103 (dismissing claim where plaintiffs "alleged no facts indicating that they were unable to receive more favorable terms from another lender, or from [defendant] by paying a different interest rate, or by accepting a different type of loan or one with a different term.").

Moreover, even if Plaintiffs were to allege that there were no alternative sources of wireless phone service that did not involve similar non-proration provisions – which they cannot – their claims would still fail because wireless phone service is not a necessity and any contract to purchase a non-essential service cannot be oppressive as a matter of law. *Belton*, 151 Cal. App. 4th at 1245-46 ("when the challenged term is in a contract concerning a nonessential recreational activity [such as listening to music or FM radio], the consumer always has the option of simply forgoing the activity" and therefore the contract term cannot be oppressive.)

In addition, Plaintiffs have not alleged "surprise" because the non-proration policy was clearly printed and explained in the Customer Agreements to which they agreed. *Aron*, 143 Cal. App. 4th at 809 (finding no surprise where defendant disclosed the terms of its refueling policy in the rental contract). The challenged policy was printed on the second page of the Customer Agreement under the heading "Your Rights to Change or End Your Service." (Request for Judicial Notice, Exs. B at p. 2, D at p. 8, and F at p. 2.) Not only was this term written in plain English – as opposed to undecipherable legalese – but part of it was also printed in bold font to make it even more noticeable. *Morris*, 128 Cal. App. 4th at

1321 (finding no surprise where challenged provision is easily located due to use of headings – "a clear heading in a contract may refute a claim of surprise"). Moreover, Plaintiffs do not allege that they were unaware of the non-proration provision when they executed their service agreements or that the terms were otherwise hidden from them. *Id.*

b. Plaintiffs Have Not Alleged Substantive Unconscionability

The substantive element of unconscionability focuses on the actual terms of the agreement and evaluates whether they create "overly harsh" or "one-sided" results that "shock the conscience." *Aron*, 143 Cal. App. 4th at 808, citing *A & M Produce Co.*, 135 Cal. App. 3d at 487; *Morris*, 128 Cal. App. 4th at 1322. "The phrases 'harsh,' 'oppressive,' and 'shock the conscience' are not synonymous with 'unreasonable.'" *Aron*, 143 Cal. App. 4th at 809, citing *Morris*, 128 Cal. App. 4th at 1322-23. As courts have recognized:

> Basing an unconscionability determination on the reasonableness of a contract provision would inject an inappropriate level of judicial subjectivity into the analysis. With a concept as nebulous as "unconscionability" it is important that courts not be thrust in the paternalistic role of intervening to change contractual terms that the parties have agreed to merely because the court believes the terms are unreasonable. The terms must shock the conscience.

Morris, 128 Cal. App. 4th at 1322-23, quoting *Am. Software, Inc. v. Ali*, 46 Cal. App. 4th 1386, 1391 (1996); *Aron*, 143 Cal. App. 4th at 809; *Belton*, 151 Cal. App. 4th at 1247.

Here, Verizon Wireless's non-proration provision does not shock the conscience. To the contrary, it is entirely reasonable to require customers to pay for

a full month of service when such service is specifically sold in monthly increments. This policy certainly does not rise to the level of being "overly harsh" or "one-sided" so as to shock the conscience. Indeed, it is a common practice in a wide variety of service industries.

Plaintiffs' allegation that the policy is unconscionable because Verizon Wireless has access to data regarding "the precise amount of wireless voice or data communications service a consumer has used at the time of cancellation of the service agreement," and thus has the technical ability to prorate the final month of charges, is unavailing. (Compl. ¶¶ 47-48.) The California Court of Appeal rejected a similar argument in *Belton*, 151 Cal. App. 4th at 1224, where the plaintiffs alleged that it was substantively unconscionable for a cable company to require customers to purchase the basic cable television tier in order to listen to music or FM radio on their televisions because it was "technically possible" to provide those services separately. As the *Belton* court explained: "Even if we accept arguendo that it was legally and technically possible to provide these services separately, it does not 'shock the conscience' for Comcast to make a business decision to package them together." *Belton*, 151 Cal. App. 4th at 1247. Here, the same is true of Verizon Wireless's monthly charges. Even if it was technologically possible to calculate prorated charges based on individual customer usage, it does not shock the conscience for Verizon Wireless to include a contract term that does not provide for such proration.

Moreover, because it is within the exclusive control of the customer to determine when in the monthly billing cycle to cancel his or her service – and thus whether he or she will be required to pay for any service after the date of cancellation – the challenged provision is not harsh or oppressive. Indeed, Verizon Wireless's non-proration policy is less harsh and oppressive than other contract provisions that courts have concluded are not substantively unconscionable as a matter of law. *See, e.g., Aron*, 143 Cal. App. 4th at 809 ("U-Haul's $20 fueling fee,

additional charges for fuel used but not replaced, and allegedly illegal measuring system do not shock the conscience as a matter of law"); *Morris*, 128 Cal. App. 4th at 1323-24 ($150 fee charged by defendants upon termination of a credit card merchant account, which is equivalent to six months of the minimum processing fee, does not shock the conscience); *Belton*, 151 Cal. App. 4th at 1246-47 (policy requiring blind people to purchase basic tier of cable television in order to receive music services on their televisions does not shock the conscience); *Wayne v. Staples, Inc.*, 135 Cal. App. 4th 466, 483 (2006)("Staples's...charge of $0.70 per $100 of declared value over $100 – a 100 percent markup on coverage for which UPS charged only $0.35 per $100 – does not shock the conscience as a matter of law."). There is, not surprisingly, no authority in California for the rather fantastic notion that it is somehow "unconscionable" to refuse to package services in the minimum time increment that is technically feasible.

C. Plaintiffs' Second Cause Of Action Fails To State A Claim For Violation Of California Business & Professions Code Section 17200

Plaintiffs' second claim alleges that Verizon Wireless's non-proration policy constitutes an "unfair, unlawful or fraudulent" business practice in violation of California's Unfair Competition Law embodied in Business & Professions Code section 17200. (Compl. ¶ 76.) Plaintiffs do not state a claim based on any of the three prongs of the Unfair Competition Law.

1. Plaintiffs Have Not Alleged Any Unlawful Conduct

Plaintiffs' claim based on the "unlawful" prong of the Unfair Competition Law fails because Verizon Wireless's policy is not unlawful. Plaintiffs primarily rely on the alleged violation of the CLRA for the underlying "unlawful" act. (Compl. ¶ 76(a) and (b).) However, for the reasons set forth above, Verizon Wireless's non-proration policy does not violate the CLRA and therefore the CLRA cannot serve as the foundation for a claim based on the "unlawful" prong of the Unfair Competition Law.

Plaintiffs also allege that Verizon Wireless's non-proration policy imposes "unlawful penalties." (Compl. ¶ 76(c).) This allegation also fails to support any claim for an unlawful business practice under the Unfair Competition Law. Despite Plaintiffs' mischaracterization, Verizon Wireless's non-proration policy by no means constitutes a "penalty," which is defined as a pre-determined amount of liability that will be incurred in the event of a breach of contract that is made without reference to the actual damages likely to be sustained as a result of such breach. *Dyer Bros. Golden West Iron Works v. Central Iron Works*, 182 Cal. 588, 592 (1920); *Ricker v. Rombough*, 120 Cal. App. 2d Supp. 912, 917 (1953). Here, the non-proration policy at issue is not implicated when a customer breaches their service agreement. Indeed, there is no allegation here that either of the Plaintiffs breached their service agreements or had to pay any monetary sum as a result. Instead, the challenged non-proration policy is nothing more than a billing structure that provides for the sale of wireless service in monthly increments. Plaintiffs have not identified any law that makes such a billing structure unlawful. Accordingly, Plaintiffs cannot state a claim based on the "unlawful" prong of the Unfair Competition Law.

2. Plaintiffs Have Not Alleged Any Fraudulent Conduct

Plaintiffs' second cause of action also fails to the extent it is based on the "fraudulent" prong of the Unfair Competition Law. To establish a claim under the fraudulent prong, Plaintiffs must allege that Verizon Wireless made representations that were false or likely to mislead. *Belton*, 151 Cal. App. 4th at 1241. Plaintiffs have not alleged any such facts.

Plaintiffs do not allege that Verizon Wireless ever made any false or misleading statement. Instead, Plaintiffs merely challenge Verizon Wireless's right to enforce the terms of the contract that Plaintiffs entered into. Because the terms of the non-proration policy are clearly stated in the Customer Agreement to which Plaintiffs agreed, Verizon Wireless's enforcement of that policy cannot support a

claim under the "fraudulent" prong of the Unfair Competition Law. *Shvarts v. Budget Group, Inc.*, 81 Cal. App. 4th 1153, 1160 (2000)(dismissing claim based on fraudulent prong where the challenged policy was "clearly printed, in boldface, in the rental agreement provided to appellants at the time of rental.").

3. Plaintiffs Have Not Alleged Any Unfair Conduct

Plaintiffs' Complaint also fails to state a claim under the "unfair" prong of the Unfair Competition Law. An "unfair" business practice occurs "when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Spiegler v. Home Depot U.S.A., Inc.,* 552 F. Supp. 2d 1036, 1045 (C.D. Cal. 2008), quoting *People v. Casa Blanca Convalescent Homes Inc.*, 159 Cal. App. 3d 509 (1984). Although the standard applicable to consumer claims under the "unfair" prong of the Unfair Competition law is in flux, courts generally recognize that one of two tests must be satisfied in order to state a claim. Under the first Cel-Tech test, any finding of unfairness must "be tethered to some legislatively declared policy." *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163 (1999); *Spiegler*, 552 F. Supp. 2d at 1045. Under the alternative balancing test approach, the utility of the defendant's challenged conduct is weighed against the gravity of harm to the alleged victims. *Spiegler*, 552 F. Supp. 2d at 1045. Regardless of which standard is applied to the facts of this case, Plaintiffs' Complaint fails to state a claim.

Plaintiffs have not stated a claim under the Cel-Tech test because the Complaint does not identify any "legislatively declared policy" that Verizon Wireless's conduct allegedly violates. Absent an allegation that the challenged conduct is tethered to some legislatively declared policy, unfairness has not been pleaded. *Spiegler*, 552 F. Supp. 2d at 1045.

Nor have Plaintiffs stated a claim based on the balancing test approach, because they do not allege any harm that they allegedly suffered as a result of Verizon Wireless's challenged policy. Indeed, all Plaintiffs allege is that Verizon

Wireless enforced (or is expected to enforce) the terms of the contracts to which they each agreed. Judge Snyder in *Spiegler* found that these types of allegations are insufficient to allege a prima facie case of harm or to establish unfairness under the balancing test approach. As the *Spiegler* court stated: "Plaintiffs entered into written contracts with defendants. Defendants complied with the express terms of the contracts, and charged plaintiffs in accordance with their terms. Plaintiffs have not identified a single false or misleading oral or written representation allegedly made by defendants. Nor have plaintiffs identified any conduct that can constitute deceit. … The Court therefore concludes that plaintiffs have failed to state a claim under the 'unfairness' prong of the UCL." *Spiegler*, 552 F. Supp. 2d at 1045-46.

Here, the sole basis for Plaintiffs' lawsuit is their dissatisfaction with one of the terms of the service contract to which they expressly agreed. However, Plaintiffs' after-the-fact dissatisfaction with a contract term that they freely entered into cannot support a claim. "The 'unfairness' prong of the UCL 'does not give the courts a general license to review the fairness of contracts.'" *Spiegler*, 552 F. Supp. 2d at 1046, citing *Samura v. Kaiser Found. Health Plan, Inc.*, 17 Cal. App. 4th 1284, 1299 (1993). Thus, when parties enter into a valid contract that contains a term subsequently challenged on the basis that it is unfair, the Unfair Competition Law cannot be used to rewrite the contract or determine whether the terms of contract are fair. *Spiegler*, 552 F. Supp. 2d at 1046; *see also, Van Ness*, 87 Cal. App. 4th at 376 (plaintiff cannot state a claim for unfair business practices where the challenged insurance coverage practice is set forth in "the clear language of the [insurance] policy."); *Baggett v. Hewlett-Packard Co.*, No. SACV 07-0667 AG (RNBx), 2009 U.S. Dist. LEXIS 95241, at *10 (C.D. Cal. Sept. 29, 2009)(defendant "did not commit an unfair business practice by providing Plaintiff with exactly what he bargained for"). Here, Plaintiffs do not allege they were unaware of the non-proration policy, nor could they because it was stated clearly in the contract terms to which they agreed. In addition, Plaintiffs' allegations

regarding the font size and location of the non-proration provision within the Customer Agreement, even if accepted as true, are insufficient to establish unfairness. *See, e.g., Plotkin v. Sajahtera, Inc.*, 106 Cal. App. 4th 953, 966 (2003)("there is no requirement that reasonable notice has to be the best possible notice").

Plaintiffs' "unfair" claim also fails because it was within Plaintiffs' exclusive discretion to decide when to cancel their wireless service contracts and thus whether to do so earlier than the last day of a monthly billing cycle. Where, as here, each plaintiff reasonably could have avoided the alleged injury, there can be no claim based on the "unfair" prong of the Unfair Competition Law. *Davis*, 179 Cal. App. 4th at 598 (finding no unfair practice where "the alleged injury…, namely, the imposition of successive late fees for successive months, reasonably could have been avoided had [plaintiff] made his monthly payments timely, or within the 10-day grace period, in accordance with his obligations under the contract."); *Camacho v. Auto. Club of S. Cal.*, 142 Cal. App. 4th 1394, 1406 (2006)(finding no unfair practice where "the 'injury' in this case is one that [plaintiff] could have reasonably avoided").

D. Plaintiffs' Third Cause Of Action Fails To State A Claim For Unjust Enrichment/Common Law Restitution

Plaintiff's third claim for unjust enrichment/common law restitution must also be dismissed for failure to state a claim. It is widely acknowledged that there is no cause of action in California for unjust enrichment. *Lopez v. Wash. Mut. Bank*, No. 1:09-CV-1838 ANI JLT, 2010 U.S. Dist. LEXIS 38307, at *28-29 (E.D. Cal. Apr. 16, 2010); *Lorenzo v. Qualcomm Inc.*, 603 F. Supp. 2d 1291, 1307 (S.D. Cal. 2009); *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (2010); *Jogani v. Super. Ct.*, 165 Cal. App. 4th 901, 911 (2008); *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 794 (2003). Instead, "unjust enrichment" is a general principle underlying various legal doctrines and remedies, rather than a

cause of action itself. *Lopez*, 2010 U.S. Dist. LEXIS, at *29; *Lorenzo,* 603 F. Supp. 2d at 1307; *Melchior*, 106 Cal. App. 4th at 784, citing *Dinosaur Dev., Inc. v. White*, 216 Cal. App. 3d 1310, 1315 (1989). "Unjust enrichment" is synonymous with restitution. *Durell*, 183 Cal. App. 4th at 1370.

Here, Plaintiffs already seek the remedy of restitution for the same alleged conduct through their second claim under the Unfair Competition Law. (Compl. ¶ 78.) Thus, their third claim must be dismissed not only because it is not a recognized cause of action in California, but also because it is duplicative of the remedy already sought in the second claim for relief. *See, e.g., Jogani*, 165 Cal. App. 4th at 911 (separate cause of action entitled "unjust enrichment" adds nothing where it is merely duplicative of the relief sought in another cause of action); *Lopez*, 2010 U.S. Dist. LEXIS, at *29 (dismissing unjust enrichment claim).

E. Plaintiff Angela Gaspar Lacks Standing To Assert Any Claim

In addition to the reasons set forth above, the claims of Plaintiff Angela Gaspar must also be dismissed due to her failure and inability to allege that she has been harmed by Verizon Wireless's non-proration policy. As set forth in the Complaint, Gaspar only recently entered into a wireless phone service agreement with Verizon Wireless. (Compl. ¶ 22.) She does not allege that she has cancelled her service agreement or that the non-proration provision has been applied to her. (*Id.*) Thus, even if this Court were to conclude that it was improper for Verizon Wireless to charge customers for the remaining time in their final billing cycle when they cancel before the last day of the billing cycle, Gaspar has not had to pay any such non-prorated charges and thus has not suffered any alleged damage as a result of the challenged policy.

In addition, at this point in time, it is entirely speculative whether Gaspar will suffer any harm from the challenged non-proration policy in the future. *See, e.g., Lee v. Chase Manhattan Bank*, No. C07-04732 MJJ, 2008 U.S. Dist. LEXIS 25007,

at *7 (N.D. Cal. Mar. 14, 2008)(dismissing claims where plaintiffs' "theory of injury…rests on a series of hypothetical assumptions about what may or may not transpire"). Given Gaspar's sensitivity to this issue, it is possible (indeed likely) that Gaspar will choose to cancel her service agreement on the final day of her monthly billing cycle in order to avoid the charges she considers to be unfair. If she does so, she will not have suffered the alleged harm that this lawsuit seeks to challenge.

Allegations of harm are required in order to state a claim for relief under the CLRA or the Unfair Competition Law. *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th 634, 641 (2009)("in order to bring a CLRA action, not only must a consumer be exposed to an unlawful practice, but some kind of damage must result"); *Durell*, 183 Cal. App. 4th at 1367 ("Relief under the CLRA is specifically limited to those who suffer damage"); *Hall v. Time Inc.*, 158 Cal. App. 4th 847, 849 (2008)("A plaintiff must have suffered an 'injury in fact' and have 'lost money or property as a result of the unfair competition' to have standing to pursue…a…claim under the California unfair competition law.")

Therefore, absent any allegation that she has suffered any tangible harm as a result of the challenged policy, Gaspar lacks standing to assert her claims against Verizon Wireless and they should be dismissed. *Jensen v. Quality Loan Serv. Corp.*, No. 09-CV-01789-OWW-DLB, 2010 U.S. Dist. LEXIS 26647, at *40 (E.D. Cal. Mar. 19, 2010)(dismissing Unfair Competition Law claim where plaintiff has not alleged any facts suggesting that he lost money or property as a result of the alleged violation); *Hoffman v. Cingular Wireless, LLC*, No. 06-CV-1021 W(BLM), 2008 U.S. Dist. LEXIS 67573, at *13 (S.D. Cal. Sept. 4, 2008)(dismissing CLRA and Unfair Competition Law claims due to plaintiffs' failure to plead facts supporting the contention that they were harmed by defendant's conduct); *Meyer v. Sprint Spectrum L.P.*, 45 Cal. 4th at 646 (affirming holding that plaintiffs'

complaint does not sufficiently allege a cause of action for injunctive relief under the CLRA where any alleged harm is speculative).

IV. CONCLUSION

For all of the foregoing reasons, Verizon Wireless respectfully requests that the Court grant the motion to dismiss with prejudice.

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